No. 2512

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, a Corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

O. C. MOORE,

Solicitor and Counsel for Appellant,

501 Peyton Building, Spokane, Washington.

GEORGE H. WALKER,

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705-6-7 Central Bldg., Seattle, Washington.

COLE PRINTING COMPANY

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I.

Concerning the question of jurisdiction, the first proposition discussed in the opposing brief, we beg to call attention to the fact that the finding contained in the order appointing the receiver in respect to the service of process contains not only the

language quoted by appellees but in full is as follows:

> "*And it appearing from the files and records herein* that due and legal notice of this application, together with a true copy of the summons and complaint herein and of the affidavit used upon this hearing, having been duly served upon the defendant, the Sunset Copper Mining Company, and that no answer, demurrer or objections to this application have been filed or made." (Tr. p. 125.)

The language quoted shows that the court in said order appointing a receiver based its claim of jurisdiction on the "files and records" in the case and the question of whether the court had jurisdiction must be confined to an investigation of those files and records, and the only service disclosed is that made in the State of New York which, under all the authorities, was not sufficient for any purpose. That the inquiry will be confined to the record where the order or decree in question recites that it is based thereon is the universal rule.

Galpin vs. Page, 18 Wallace 350.
Johnson vs. North Lumber Co. (9 Cir). 206 Fed 624, 629.
Foster vs. Milburn, 202 Fed. 175.

Speaking on this point in Galpin vs. Page, above cited, it is said:

"When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, *and it will not be presumed* that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, *it will not be presumed that service was also made at another and different place;* or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed." (Italics ours.)

Furthermore, the complaint alleges (Tr. pp. 10, 11):

"That although there was a pretended service of summons in this suit upon Henry C. McNutt as President, in Glenns Falls, New York, there was as a matter of fact, no proper or sufficient service had on the defendant corporation; * * * That the entire proceeding (Bell vs. Sunset Copper Mining Company) is null and void for the reason that *no personal service was had on the defendant cor-*

poration, and that there was no service, or attempt at service, by publication."

The answer of Black Paragraph 10 (Tr. pp. 30, 31), admits there was no service by publication, but alleges on the contrary that the service was actually made on Henry C. McNutt in Glenns Falls, New York. Defendant further alleges:

> "That at the time of the commencement of said action in the Superior Court of Snohomish County, being numbered 9510, a copy of the summons and complaint was duly served upon H. C. McNutt, who was then the President of the Sunset Copper Mining Company; that said service was made in the State of New York, and at the said time the said H. C. McNutt made an acknowledgment in writing as follows, to-wit:
>
> 'The above named defendant by H. C. McNutt, the President, does hereby acknowledge due and timely service of the foregoing summons and complaint. Dated November 30th, 1908. H. C. McNutt, President of Sunset Copper Mining Company, a corporation,' which written acknowledgment was attached to the summons and complaint in said action numbered 9510."

In view of the above admissions and allegations of the answer, and in view of the fact that said record does not show any service other than that on the President of the Company in the State of New York, there was no occasion for the introduction of testimony to establish the absence of

any proper service of process, and the order of court referring to the record in support of its jurisdiction was very clearly entered without jurisdiction.

II.

The contention made in Chapter VI of the opposing brief that this suit cannot be maintained because "the Transcript shows that the corporation did not appear in the action and there was no proof of service upon it," is wholly untenable under the conditions existing in the case at bar. The return of the service of the subpoena made by the United States Marshal is as follows:

> "I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with W. W. Black personally at Everett, Western District of Washington, on the 27th day of March, 1912, and after due and diligent search I have been unable to find the within named Frank L. Bell and Sunset Copper Mining Company in this district."

The record herein also shows (Tr. 181) that the corporation was allowed by its manager, Black, to forfeit its charter and that it ceased to have any legal existence on the 23rd day of August, 1909, hence the marshal was entirely correct in the statement found in his return that the Sunset Copper Mining Company was not to be found within the district. We, nevertheless, contend that, even

had the company been in legal existence at the time of the institution of this suit, the appellees would be estopped from claiming that no service had been made on it, since the return of the marshal shows that personal service was made upon Black, who was at all times during the life of the corporation a trustee and its general manager. A person occupying such official positions with a corporation cannot, we submit, be allowed to contend that the personal service upon him of a subpoena directed not only to himself but to his corporation, did not constitute service upon the corporation, but was intended for himself alone. We confidently submit that the contention of a trustee and general manager joined with his corporation as a defendant in a legal proceeding, that the personal service of process upon himself directed to all the defendants was intended for himself alone and not for the corporation, would of itself constitute the strongest kind of evidence of fraud. Had the proposition advanced any merit, which as we shall present show it has not, the appellees would be estopped from successfully urging it under the circumstances disclosed in this case.

Under another head, we shall presently show that a stockholder may maintain a suit against persons wrongfully in possession of the assets of a defunct corporation to the same effect as if the corporation were in actual existence.

III.

The allegations of the bill and the evidence introduced thereunder discloses a condition entirely obviating the requirements of equity rule 94, which was in force at the time this suit was begun, and which, with some modifications, has been incorporated in the new rules as rule 23. The bill alleges, Paragraph 25 (Tr. p. 16):

> "That ever since the transfer and assignment of the 1,250,000 shares of stock by the said Ellen C. Baldwin to the said Frank L. Bell, the said defendants W. W. Black and Frank L. Bell, have owned and controlled a majority of the outstanding stock of the defendant corporation, and that they have been ever since said time, and still are in the actual control of the said corporation; that so conspiring and confederating one with the other, they have operated and controlled the said defendant corporation solely for their own interest, and totally disregarded the rights and interests of the said defendant corporation, and the rights and interests of the minority stockholders."

The answer of Bell and Black (Tr. pp. 36-57), both admit the ownership by them of a majority of the capital stock of the corporation, and since Black, as one of the trustees and general manager, was the perpetrator and beneficiary of the wrong complained of, and since McNutt, as President, by his conduct in pretending to accept service of

process and thereafter failing to take any steps for the protection of the rights of the Company, had shown himself in league with Bell and Black, or, at least, indifferent to the interests of the Company and its stockholders, it would obviously have been unavailing to make a formal demand upon officers of the Company to take any legal action. In the case of Doctor vs. Harrington, the bill filed by a stockholder, alleged that the Board of Directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of the majority of the capital stock of said corporation" likewise controlled "the action of the stockholders," and said allegations were held, under the circumstances, to be a sufficient compliance with the rule.

Commenting and approving the rule announced in Doctor vs. Harrington, the Supreme Court in the later case of *Delaware & H. Co. vs. Albany & S. R. Co.*, 213 U. S. 435, said:

> "The efforts that were made to secure the action of the managing directors or trustees were not 'set forth with particularity.' Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case, not of compliance with the requirements of rule 94, but circumstances which excused from such compliance."

Foster's Federal Practice (4th Ed.), Sec. 76, p. 397, discussing this question and citing many authorities, says:

> "A previous demand is not required in a case where it clearly appears that the corporation would certainly refuse to bring the suit, and the demand would be a vain and useless act. For example: a bill by a minority stockholder to set aside a contract fraudulently made between his corporation and another in which a majority of his fellow stockholders are interested, need not allege a previous demand upon his board of directors to bring the suit and their refusal when it shows that such board has been elected by the hostile majority for their own interest."

We therefore contend that the allegations of the complaint are entirely sufficient under the above quoted decisions.

Again, the requirements of rule 94 are not jurisdictional, and a failure of the complaint in that regard does not affect the validity of a decree where the question is not raised in a timely manner, and where the question is raised in a timely manner, the court will always permit an amendment.

> "This rule in the federal courts requiring stockholders to endeavor to have the corporation bring the suit and to allege what steps he has taken in that direction, does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain the suit. It may

be raised by demurrer. A failure, however, to allege such facts does not prevent jurisdiction attaching."

Cook Corporations (6th Ed), Sec. 740, pp. 2471, 2474.

See also

Illinois, Etc., R. Co. vs. Adams, 180 U. S. 28.

That questions as to defects in a complaint, not jurisdictional, must be raised by demurrer or answer, and if not so raised are deemed to have been waived, is the holding of all authorities:

"Advantage can be taken of most defects in a bill by answer, as well as by demurrer. But objections to defects in the form of a bill, except possibly those which are required by the equity rules, can only be raised by demurrer."

Foster's Federal Practice (4th Ed.), Sec. 110, p. 485.

Furthermore, the rule does ont apply where the corporation has for any reason been dissolved or its officers have become incapacitated to act.

Discussing this phase of the questions, *Foster's Federal Practice* (4th Ed.), Sec. 76, p. 395, says:

"It does not apply to suits brought by the stockholders of a corporation after its dissolution. Nor to a case where the corporation

has made a general assignment for the benefit of its creditors, and the assignees in insolvency has refused to bring the suit. Nor, it has been held, to a suit by a stockholder alleging that his corporation has ceased actively to conduct its business and to elect officers and directors, praying the appointment of a receiver and a winding up of its affairs."

Lafayette Co. v. Neely, 21 Fed. 738;
Briggs v. Traders' Ins. Co., 145 Fed. 254;
Taylor vs. Holmes, 127 U. S. 489;
General Electric Co. vs. West Asheville Imp-Co., 75 Fed. 386;
Boyd vs. Hankinson, 92 Fed. 47.

Turning now to the evidence, we find from the certificate of the Secretary of the State of Washington, complainant's Exhibit "Q" (Tr. 173), that the last license fee paid by the corporation was on June 30th, 1905. From a letter of the Secretary of State, defendants Exhibit 21 (Tr. 181), we find that the corporation ceased to exist on August 23rd, 1909, on which date it was stricken from the records for failure to pay its annual license fee as required by statute. Thus, we find that the corporation, through the negligence of its officers, Black being general manager, was permitted to die and ceased to have any legal existence within a few months after the confirmation of the receiver's sale. This obviously was a part of the general plan of Black in his scheme for the absorp-

tion of the assets, which had at that time been accomplished. The evidence, therefore, discloses that there was no corporation to bring suit and, of course, if there was no corporation, there was no board of trustees on whom demand could have been legally made at any time subsequent to the 23rd day of August, 1909, on which date the corporation lost its corporate existence.

IV.

Under head number VII, appellees contend that the decree of dismissal must be sustained because of the omission from the bill of complaint of a distinct allegation that the suits brought by complainant on behalf of himself and others similarly situated were for the benefit of the corporation and its stockholders.

Our first answer to this contention is that appellees have waived this defect, if such it may be denominated, by their failure to in any way raise the question in their pleadings either by demurrer or answer. In support of this contention, we cite authorities cited by us in opposition to the contention that there has been a failure to comply with equity rule number 94.

We also call attention to Paragraph VII of the complaint (Tr. 4), wherein it is alleged that the appellant is and since 1902 has been the owner of

58,250 shares of stock, and then attention is invited to the following language in the prayer of the complaint (Tr. 18):

> "That the said defendants, W. W. Black and Frank L. Bell, be declared to be trustees for and in behalf of the said corporation and its stockholders, and be declared to hold all of the said property as trustees for the use and benefit of the said corporation, for its bona fide creditors and stockholders * * * and that your orator may have such other and further relief as the equity of the case may require, and as to your Honors may seem equitable, proper and just."

Also the testimony of the appellant (Tr. 104), where he said:

> "Fearing that the properties would be entirely lost, I instituted this suit to safeguard the interests of the Company."

In view of the above allegations and testimony of the appellant, it seems to us little less than frivolous that questions should now be raised for the first time in respect to the purposes of appellant, by whom this suit was brought. Surely a court of equity which looks not at all to the form but to the substance of things, with a view to granting such relief as the conditions may require, will not hold that this suit, wherein it is sought to have appellees "declared to be trustees for and in behalf of the said corporation and its stock-

holders, and be declared to hold all of the said property as trustees for the use and benefit of the said corporation, for its bona fide creditors and stockholders," cannot be maintained, because it is not recited in the preamble to the complaint that the suit is instituted by the complainant for the use and benefit of those in like situation with himself. If a money judgment were demanded as a part of the relief in this suit, it might be possible to advance a plausible argument in support of this contention, but since appellant asks nothing on his own behalf but only for the corporation and its stockholders, no possible doubt can exist as to his purpose in bringing this suit, nor would it be possible for him to in any way gain a personal advantage different from that of the other stockholders by waging this litigation.

V.

As to the contention made under head VIII of appellee's brief, that appelant failed to show that he was injured by the sale of the assets of the Company, and that there was no evidence in the record that the property is worth a single dollar, we call attention to the allegation in Paragraph V of the complaint (Tr. 4), which is as follows:

> "That certain mining property hereinafter described and now held and claimed by the defendants, W. W. Black and Frank L. Bell,

> is the matter in controversy in this suit; that the matter in controversy greatly exceeds in value the sum of Three Thousand ($3000.00) Dollars, exclusive of all interest and costs."

The above allegation of the complaint is admitted by the answers of both Black and Bell (Tr. 24 and 49). Again, it is alleged at the end of Paragraph XXIV of the complaint (Tr. 16):

> "That the value of the property in question greatly exceeds the sum of $40,000.00."

In respect to this allegation, Black, at the end of Paragraph XXVII of his answer (Tr. 36), says:

> "That the defendant * * *denies that the value of the property in question will exceed the sum of $40,000.00."

This denial, under the rules of pleading, must be deemed an admission that the property is of a value of $40,000.00, though not in excess of that amount. That there was evidence introduced at the trial as to the value of the property for some purpose is evidenced by the following statement in the written opinion filed by the trial court (Tr. 79), where it is said:

> "There is no direct evidence before the court as to the value of this property as mineral land."

Therefore, it must be obvious to this court that

there was evidence in regard to the value of said land for other purposes.

This appeal is prosecuted by appellant Buchler and not by Black and Bell. The appellant, therefore, in compliance with the requirements of the practice, filed certain assignments of error which he believed to have been committed by the trial court, and in condensing the record as required by rule 75 of the new equity rules, in an endeavor to comply with the requirement of that rule, very naturally omitted therefrom all portions of the testimony not necessary in connection with the argument of the assignments of error made by him. Subdivision B of said equity rule 75, in respect to the preparation and reduction of the record on appeal, contains the following:

> "The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, *all parts not essential to the decision of the questions presented by the appeal being omitted* and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness."

The certificate to the statement of facts of Judge Neterer, before whom the case was tried below (Tr. 112, 113), is as follows:

> "I hereby certify that the foregoing state-

> ment contains in a simple and condensed form, a true, complete and properly prepared statement of the oral testimony upon which the final decree and the decree denying Petition for Re-Hearing herein was based; and that it, together with the following Exhibits and parts thereof * * * constitutes all the evidence essential or necessary to a review and decision of said cause on appeal."

The language quoted from the opinion of Judge Neterer in connection with his certificate to the condensed record, above quoted, makes it entirely clear that not all the testimony is included in the Transcript, but only such portions as are necessary for a review of the questions discussed in the written opinion of the trial judge, and in the absence of the entire testimony, this court cannot, we respectfully submit, give consideration to any other questions than those discussed in Judge Neterer's written opinion, all of which, but none other, are fully covered by appellant's specifiications of error.

It is obvious, at first blush, that testimony introduced at the trial in respect to the value of the property is not necessary in support of the questions raised by appellant under his assignments of error, and since no cross-appeal has been taken by appellees, we do not believe that they can now be heard to make the argument advanced by them.

Furthermore, equity rule 76 provides:

> "If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

We therefore suggest that if this point be deemed of any importance, this court direct that any evidence introduced at the trial in respect to the value of these properties be set up as a supplemental record, in pursuance of rule 76.

To the contention that there is no showing that appellant, the corporation or any of the stockholders have been injured by the absorption of the assets by Black and Bell, there are many answers, but we shall content ourselves at this time with a suggestion that Black and Bell have obviously gained an advantage over the other creditors by buying in the properties in satisfaction of their demands, even should it be admitted that their claims were just and proper. The fact, however, that the judgment of $12,767.57 obtained by Bell in New York, wholly without jurisdiction, and the judgment obtained by him in the State of Washington in the receivership suit, likewise without jurisdiction, were absolutely void; consequently, it cannot be said that the record shows that the appellees paid anything for the property

other than the $2000.00, which the receiver claims to have received, concerning the disposition of which money, the receiver, if he did in fact receive same, has, as pointed out in our opening brief, made no accounting to the stockholders or the creditors of the corporation.

Another element of damage to the appellant, the corporation and all its stockholders, is, as pointed out in our opening brief, that, in consequence of the property having been sold by a receiver instead of the regular course of foreclosure, they have been deprived of the right of redemption. Again, the statutes of Washington require sixty days' notice for the sale of any interest in real property on foreclosure, while the order of court, under which the receiver acted in the present instance, only required a notice of four weeks (Tr. 146), and the receiver's report of the sale sates that the sale was had on the notice required by the court. The order of court directing the sale was entered on February 15th, 1909 (Tr. 147), and the sale was held on March 20th, 1909. In other words, the notice required by the court for the receiver's sale was less than half the time which would have been required had the foreclosure proceedings taken an orderly course.

VI.

In subdivision 13 of appellees' brief, in connection with the question of laches, is presented a long and involved discussion of portions of the testimony. Most of the testimony discussed and the deductions drawn therefrom, being, as we view the case, entirely irrelevant to any issue presented by this appeal. Time and space forbid a detailed analysis of appellees' argument on this and many other points covered by their brief, but a single instance will serve to indicate how inaccurate are the statements made and how unfair the inferences sought to be established, to-wit, the statement that "after the sale, Black and Bell held a meeting with *the other stockholders* and offered to let them come in and share in the bid on the basis of $40,000.00, Bell offering to throw out his judgment recovered in New York and to lose his services. Bell offered to do this upon the trial (Tr. 110) and Buchler would not even accept this offer." The inference to be drawn from the above quoted statement is, that the meeting referred to was with all the stockholders held after due notice and for a stated purpose, yet on turning to page 110 of the Transcript, cited by appellees in support of the statement quoted, we find the following:

"After that in Everett we had a meeting

> with a number of the stockholders, when Judge Black, in behalf of himself and myself, offered to allow all stockholders to come in and share in this bid, paying on the same basis that we did, Forty Thousand Dollars. I was present at the meeting and assented to it and would assent to it now. In making that offer, I offered to throw off Ten Thousand Dollars represented by the judgment I had obtained in New York."

From the testimony quoted, it is obvious that the stockholders' meeting referred to was only casual and attended by only a few stockholders, since the language is that "we had a meeting with a number of the stockholders." Certainly it was not a general or formally called meeting, held for a stated purpose, and any proposition which Bell or Black might have brought forward at such a time could not have the slightest bearing on the legal rights of any other stockholder or even on the stockholders in attendance, nor on the corporation or its creditors.

In many of the cases cited on the question of laches, a change in the condition of the parties or property or intervention of the rights of third persons rendering it impossible to do equity where the actuating causes which prevented the court from granting relief rather than the lapse of time which, as pointed out in our opening brief, is never, standing alone, a matter of serious consequence in an equity suit in the federal court.

Other cases cited, particularly those from this circuit, were brought for the purpose of directly annulling and vacating state court judgments where relief of the same character could have been had at law in the court by application to the court in which the judgment was rendered. In this case, however, it is sought to charge defendants with a constructive trust and no change or intervening rights have occurred which would prevent doing of substantial equity between all parties concerned. As said by the Supreme Court in *Johnson vs. Waters,* 11 U. S. 640, after observing that a court of chancery is always open to hear complaint against fraud, whether committed in pais or by means of judicial proceedings, said:

> "In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

It is also contended that the complaint is defective in that the appellant does not specifically offer to do equity or to restore Black and Bell to their former positions.

This contention overlooks the prayer of the complaint for such equitable relief as the court may

find proper and just. It also overlooks the fact that the appointment of a receiver is sought for the purpose of doing equity between all the parties concerned. Another reason why such an offer is not necessary is that this is a suit by a minority stockholder for the use and benefit of the corporation and other stockholders and creditors, and the authorities hold that an offer to do equity or to make any restoration to the defendant is not necessary in such a suit, for the reason that the complainant did not himself receive any personal benefit whatever from the transaction in question, nor the possession or control of any of the fruits thereof.

In the case of *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, 389, 390, 391, discussing this point, it is said:

> "If the transaction was fraudulent, both companies were praties thereto, and perhaps neither could maintain an action to set it aside. But the complainant, a stockholder and income bondholder of the Bay State Gas Company of Delaware, is not in this position. He was not a party to the fraud, and may not he and other stockholders and bondholders undo the wrong done to them by the fraudulent transaction without first requesting the Bay State Gas Company of Delaware to return the bonds issued by the New Jersey Company? It is, of course, true that he who seeks equity must do equity, and it is a condition precedent to the rescinding of a fraudulent or ultra vires

act that restitution be made of the fruits of the transaction relieved against. * * * The complainant could not offer to return the $1,300,000 of bonds he is not in possession or control thereof, and, the company having refused to bring the suit, it would have been a vain thing for the complainant to have requested it to offer to return the $1,300,000 of bonds. The law does not require a party to do a vain thing."

For a full discussion of this question, see also:

Citizens' Savings & Trust Co. vs. Illinois Central Railroad Co., 182 Fed. 607;

Johnson vs. Forsyth Mercantile Co., 127 Fed. 845, 848;

Hosmer vs. Wyoming Railway & Iron Co., 129 Fed. 883.

VII.

In Chapter 14 of their brief, appellees contend that, by the elimination from the prayer of the complaint the demand that the proceedings in the state court in the case of Bell vs. The Company, "be set aside and canceled" by the federal court, constitutes a ratification of the acts of Black and Bell. This contention does not demand serious consideration, but we will say in passing that said language was eliminated from the prayer so that there might not be any ground for doubt that this is an equity suit in *per sonam* for the pur-

pose of charging Black and Bell as constructive trustees and wresting from them the property the possession of which they have obtained, and to which they have a paper title only, through the wholly void and illegal proceedings in the receivership case. The amendment was made in view of the rule that, since under Section 720 of the revised statutes, 4th Fed. Stat. Ann. p. 509, federal courts may not proceed directly against or in any way revise the record of a state court, but will, nevertheless, take such action as may be necessary to deprive the beneficiary of a void state judgment of the benefit of his ill-gotten gains.

In *Marshall vs. Holmes,* 141 U. S. 589, 35 L. Ed. 870, in speaking of the authority of a Federal Court over the judgment of a state court, Mr. Justice Harlan said:

> "While it cannot require the state court itself to set aside or vacate the judgment in question, it may, as between parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravne that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud."

See also:

Johnson vs. Waters, 111 U. S. 640;
Arrowsmith vs. Gleason, 129 U. S. 86, 32 L. Ed. 630;
Schultz vs. Highland Gold Mining Co., 158 Fed. 337;
Also *Notes on this subject,* 4th Fed. Stat. Ann., p. 5.

VIII.

In respect to the charge made in Paragraph XV of appellees' brief that we have abandoned the theory upon which the case was tried below, we beg to call attention to page 89 of the Transcript, where are set forth excerpts from the petition for a re-hearing presented by the appellant to the lower court. A glance at the brief portions of said petition contained in the Transcript will at once disclose the incorrectness that appellant has in any way shifted his position. Such an examination will disclose, on the other hand, that the points now urged upon this court were also, in due season, presented to the trial court. Again, this being an appeal in equity, this court will review the case *de novo* and give due consideration to any proposition advanced, provided it be within the contemplation of the assignments of error made by the appellant.

Other propositions urged by appellees, in so far as they are relevant, have, we believe, been discussed with sufficient fullness in our opening brief, while other points advanced by the opposition appear to us to be without merit or any bearing on the issues presented by this appeal.

We therefore urge that the decree appealed from should be reversed.

Respectfully submitted,

O .C. MOORE *and*
GEORGE H. WALKER,
Solicitors and Counsel for Appellant.